

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of )
)
INFORUM COMMUNICATIONS, INC., )
Assignor )
and ) File No. BALMD-20010718AAC
)
TDI ACQUISITION CORPORATION, )
Assignee )
)
For Assignment of Multipoint Distribution Service )
(MDS) Stations KNSC300, KNSC798, and )
WMI303, Sarasota, Florida, and of the Sarasota, )
Florida BTA (MDB408) )
)

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2005

Released: January 12, 2005

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by Paradise Cable, Inc. (Paradise) on October 6, 2003. Paradise seeks review of a September 9, 2003 Memorandum Opinion and Order of the former Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau, which dismissed Paradise's petition to deny an application seeking Commission consent to assign the licenses for Multipoint Distribution Service (MDS) Stations KNSC300, KNSC798, and WMI303, Sarasota, Florida and the Sarasota, Florida Basic Trading Area (BTA) Authorization (MDB408) from Inforum Communications, Inc. (Inforum) to TDI Acquisition Corporation (TDI). For the reasons stated below, we deny the AFR.

II. BACKGROUND

2. As of January 1, 1998, Paradise was the licensee of MDS Stations KNSC300, KNSC798, and WMI303, Sarasota, Florida and the holder of the Sarasota, Florida BTA authorization. Cable

1 Paradise Cable, Inc., Application for Review (filed Oct. 6, 2003) ("AFR").

2 Inforum Communications, Inc., Memorandum Opinion and Order, 18 FCC Rcd 18508 (WTB PSPWD 2003) (MO&O).

3 Paradise Cable, Inc., Petition to Deny (filed Aug. 31, 2001) ("PTD").

4 File No. BALMD-20010718AAC (filed July 18, 2001) (Application). On August 3, 2001, the application was accepted for filing. See Public Notice, Report No. 460 (Aug. 3, 2001).

Corporation of America (CCA) was the parent company and sole shareholder of Paradise.<sup>5</sup> John C. Hill was the President of both CCA and Paradise.<sup>6</sup>

3. On March 16, 1998, creditors initiated an involuntary Chapter 7 bankruptcy proceeding against CCA in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division (Case No. 98-42078B1) (the Bankruptcy Court).<sup>7</sup> CCA voluntarily converted the bankruptcy proceeding into a Chapter 11 reorganization on April 14, 1998. On November 17, 1998, SkyLynx Communications, Inc., CCA, and the Official Committee of Unsecured Creditors (the Committee) drafted a Plan Term Sheet memorializing an agreement whereby SkyLynx would purchase the subject licenses and the parties would propose that the Bankruptcy Court tailor a confirmed plan of reorganization to reflect the arrangement.<sup>8</sup> On November 30, 1998, Paradise, CCA, and SkyLynx entered into a Channel Lease Agreement with an option for SkyLynx to purchase the subject stations.<sup>9</sup> The Bankruptcy Court subsequently approved the Channel Lease Agreement.

4. Pursuant to the Plan Term Sheet, SkyLynx filed the Disclosure Statement and the Creditors' Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Cable Corporation of America (Creditors' Plan) on February 1, 1999. The Bankruptcy Court approved the Disclosure Statement on March 9, 1999.<sup>10</sup> On May 12, 1999, the Bankruptcy Court approved the Creditors' Plan, as amended.<sup>11</sup> On June 2, 1999, the Bankruptcy Court denied a Motion for Reconsideration of the Confirmation Order.<sup>12</sup> Although no appeal was taken,<sup>13</sup> various parties-in-interest, including Mr. Hill, subsequently sought to have the *Confirmation Order* revoked or rescinded in the federal courts. The *Confirmation Order* has been upheld in each instance against such challenges.<sup>14</sup>

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<sup>5</sup> See PTD.

<sup>6</sup> See *Hill v. Inforum Communications, Inc. (In re Cable Corporation of America)* (Bk. Case No. 98-04207-8B1), *Order on Appeal*, No. 8:02-CV-806-T-17-MAP (M.D.FL. Oct. 29, 2002) (*Hill v. Inforum*).

<sup>7</sup> See *Official Committee of Unsecured Creditors v. SkyLynx Communications, Inc. (In re Cable Corporation of America)* (No. 98-04207-8B1), *Order on Final Evidentiary Hearing*, Adv. No. 00-112 (Bankr. M.D.FL. Oct. 2, 2002) (*Order*).

<sup>8</sup> See Inforum Opposition, Exhibit B (Plan Term Sheet). The Plan Term Sheet was signed by the parties on December 18, 1998. See *id.* Mr. Hill signed the document on behalf of both CCA and Paradise. See *id.*

<sup>9</sup> At this time, CCA became unable to continue doing business. Pursuant to the Channel Lease Agreement, SkyLynx funded operations pending the filing and confirmation of a plan of reorganization. See *Hill v. Inforum* at 2.

<sup>10</sup> See *Hill v. Inforum* at 3.

<sup>11</sup> *In re Cable Corporation of America, Order Confirming Plan of Reorganization for Cable Corporation of America*, No. 98-04207-8B1 (Bankr. M.D.FL. May 12, 1999) (*Confirmation Order*). We hereinafter refer to the plan, as confirmed by the Bankruptcy Court on May 12, 1999, as the Confirmation Plan or the Confirmed Plan.

<sup>12</sup> See *Order* at 3. The motion sought a rehearing to allow sufficient time for Sprint Corporation (Sprint) to submit a formal proposal and to explore other possible bids for the assets of the bankrupt estate. See *Hill v. Inforum* at 4. The Bankruptcy Court found the motion to be without merit. See *id.*

<sup>13</sup> See *Order* at 3.

<sup>14</sup> See generally *Hill v. Inforum* at 8-12; see also *Harry L. Brown, Jr., et al., v. Inforum Communications, Inc. f/k/a SkyLynx Communications, Inc. (In re Cable Corporation of America)* (No. 98-04207-8B1), *Order*, Case No. 03-00253-CV-T-17-EAJ (M.D.FL. Dec. 12, 2003); *Official Committee of Unsecured Creditors v. Inforum* (continued....)

5. On the effective date of the Confirmation Plan, June 3, 1999, SkyLynx executed the delivery of 100,000 shares of SkyLynx Pool A Stock and 20,000 shares of SkyLynx Pool B Stock.<sup>15</sup> CCA and Paradise executed and delivered to SkyLynx a Bill of Sale and Equipment Lease on the same date.<sup>16</sup> In addition, the Channel Lease Agreement became final on the effective date.<sup>17</sup> The Confirmation Plan also provided for certain transactions to occur subsequent to that date to effectuate the actual assignment of the licenses to SkyLynx.<sup>18</sup>

6. On July 9, 1999, Paradise applied for Commission consent to assign the subject licenses to SkyLynx.<sup>19</sup> The application was accepted for filing on July 28, 1999.<sup>20</sup> No comments or objections to the application were filed. The Commission granted the application on October 6, 1999.<sup>21</sup> Pursuant to the Commission's Rules, the parties had until November 20, 1999 to consummate the transaction. A number of requests were thereafter submitted by SkyLynx and Inforum<sup>22</sup> to extend the consummation deadline.<sup>23</sup> On

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*Communications, Inc. f/k/a SkyLynx Communications, Inc. (In re Cable Corporation of America (No. 98-04207-8B1)), Order, Appeal No. 04-10215II (11<sup>th</sup> Cir. Ct. App. June 3, 2004).*

<sup>15</sup> See *Hill v. Inforum* at 4. On June 4, 1999, the Bankruptcy Court approved a Disbursing Agent. See *id.*

<sup>16</sup> See *Hill v. Inforum* at 4. Mr. Hill signed the Bill of Sale and Equipment Lease.

<sup>17</sup> See *Hill v. Inforum* at 4. Mr. Hill signed the Channel Lease Agreement. Pursuant to the Channel Lease Agreement, SkyLynx continued to assume the obligations and pay the debt owed to the Commission with regard to the subject licenses, including those due under an Installment Payment Note (Note) made in the original amount of \$923,440.00. See *Hill v. Inforum* at 4.

<sup>18</sup> See *Hill v. Inforum* at 4. The execution of the Commission's Assignment and Assumption of Installment Payment Plan Note and Security Agreement for Multipoint and/or MultiChannel Distribution Service (MMDS) ("Assumption Agreement") was one such transaction. See *id.*

<sup>19</sup> See FCC File No. BMDAL-990709XV (filed July 9, 1999) (1999 Application). Mr. Hill signed the application on behalf of Paradise.

<sup>20</sup> *Public Notice*, Report No. D-1056 (July 28, 1999).

<sup>21</sup> *Public Notice*, Report No. 115 (Oct. 6, 1999).

<sup>22</sup> On December 14, 1999, the hereto referenced SkyLynx Communications, Inc., an entity incorporated in the State of Colorado, merged into SkyLynx Communications, Inc., an entity incorporated in the State of Delaware. See Articles of Merger of SkyLynx Communications (a Colorado Corporation) and SkyLynx Communications, Inc. (a Delaware Corporation) (filed Dec. 14, 1999) ("Articles of Merger"). The newly merged SkyLynx, incorporated in the State of Delaware, subsequently filed to change its name to Inforum on April 26, 2000. Inforum notified the Commission of the change in its name on August 15, 2000.

<sup>23</sup> Specifically, SkyLynx and Inforum filed extension requests with the Video Services Division of the Mass Media Bureau (Division) on November 17, 1999; December 29, 1999; February 2, 2000; March 28, 2000; May 15, 2000; June 30, 2000; and August 15, 2000. The Division granted the requests, respectively, by letters, dated November 30, 1999; December 29, 1999; February 14, 2000; March 29, 2000; May 16, 2000; July 5, 2000; and August 23, 2000 (thereby extending the consummation deadline to October 1, 2000). We note that counsel representing Paradise before the Commission in this proceeding was served with a copy of each extension request. See also *Order* at 10, n.3 (noting that Paradise's counsel was copied on all of the extension requests). The Commission thereafter waived the October 1 deadline on its own motion "in light of the various administrative delays in preparing and executing the Assignment and Assumption Agreement." Letter from Sharon Bertelsen, Supervising Attorney, MDS Section, Video Services Division, Mass Media Bureau, FCC, to Howard J. Barr, Esq., Pepper & Corazzini, LLP (dated November 7, 2000). Paradise's counsel was served with a copy of the letter and failed to file any objection to the Commission's action.

August 18, 2000, the parties executed the Assumption Agreement and forwarded it to the Commission.<sup>24</sup> The Assumption Agreement was signed by Mr. David H. Roberts, as Director of Paradise, on behalf of the assignor, and by Mr. Jeffrey Mathis, as President and CEO of “Inforum Communications, Inc. f/k/a SkyLynx Communications, Inc.”, on behalf of the assignee.<sup>25</sup> A notice of consummation was filed with the Commission on October 27, 2000.<sup>26</sup> No party sought reconsideration of the Commission’s actions with regard to the transaction. On November 16, 2000, Inforum delivered a copy of the Assumption Agreement and the remaining 100,000 shares of stock to the Disbursing Agent.<sup>27</sup>

7. The Bankruptcy Court,<sup>28</sup> the United States District Court for the Middle District of Florida, Tampa Division (District Court),<sup>29</sup> and the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit)<sup>30</sup> have each independently issued opinions concluding that the events above constitute a substantial confirmation of the Confirmed Plan and rejected attempts to revoke or rescind the *Confirmation Order*. The District Court explained that, “[i]n each of these attempts the Bankruptcy Court, the District Court and/or the Eleventh Circuit . . ., as each may apply, determined that the confirmation of the plan could not and/or should not be undone. Most importantly, the 11<sup>th</sup> Circuit determined that the Plan had been substantially consummated and judicial relief was no longer a viable option.”<sup>31</sup> The District Court reiterated that “[t]he Confirmation Order was entered by a court of competent jurisdiction, the Bankruptcy Court, in accordance with due process.”<sup>32</sup> The District Court,

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<sup>24</sup> See Assumption Agreement.

<sup>25</sup> See *id.* Mr. Roberts declared, under penalty of perjury, that, as Director, he was an authorized representative of the assignor. See *id.*

<sup>26</sup> Letter from Howard J. Barr, Esq., Pepper and Corazzini, LLP, to Magalie Roman Salas, Secretary, FCC (Oct. 27, 2000) (Consummation Notice).

<sup>27</sup> See *Order* at 8; *Hill v. Inforum* at 5. Specifically, Inforum delivered 100,000 shares of SkyLynx Pool A Stock. See *Order* at 8.

<sup>28</sup> See, e.g., *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (No. 98-04207-8B1))*, *Order on Defendant’s Motion for Summary Judgment*, Adv. No. 99-591 (Bankr. M.D.FL. Dec. 23, 1999).

<sup>29</sup> See, e.g., *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (BK No. 98-04207-8B1))*, *Order on Appeal*, Docket No. 39 (Adv. No. 99-591) (M.D.FL. Feb. 9, 2001) (affirming summary judgment in favor of SkyLynx).

<sup>30</sup> See *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (BK No. 98-04207-8B1))*, *Judgment*, Docket No. 40 (Adv. No. 99-591) (11<sup>th</sup> Cir. Ct. App. July 6, 2001) (dismissing appeal as moot).

<sup>31</sup> *Hill v. Inforum* at 6. Most recently, the District Court, once again, found that the issues raised by the appellants have been decided against them in previous litigation. See *Harry L. Brown, Jr., et al., v. Inforum Communications, Inc. f/k/a SkyLynx Communications, Inc. (In re Cable Corporation of America (No. 98-04207-8B1))*, *Order*, Case No. 03-00253-CV-T-17-EAJ (M.D.FL. Dec. 12, 2003). Although appeal was taken, the Eleventh Circuit dismissed the matter on June 3, 2004. See *Official Committee of Unsecured Creditors v. Inforum Communications, Inc. f/k/a SkyLynx Communications, Inc. (In re Cable Corporation of America (No. 98-04207-8B1))*, *Order*, Appeal No. 04-10215II (11<sup>th</sup> Cir. Ct. App. June 3, 2004). Neither party has informed the Commission of any further appeals taken in this matter or any other appeals that remain pending before the courts.

<sup>32</sup> *Hill v. Inforum* at 12.

therefore, emphasized that “[n]o challenge to the Bankruptcy Court’s jurisdiction over the confirmation of the Plan has been, or could be, asserted.”<sup>33</sup>

8. On July 18, 2001, Inforum filed the instant application seeking Commission consent to assign the subject licenses to TDI.<sup>34</sup> The application was accepted for filing on August 3, 2001.<sup>35</sup> On August 31, 2001, Paradise opposed the application.<sup>36</sup> The PTD contended that the prior assignment of the subject licenses from Paradise to Inforum was invalid.<sup>37</sup> According to the PTD, Inforum failed to fulfill its obligations under the Confirmed Plan because it allegedly “delayed tendering to the CCA shareholders the stock called for by the Court-approved reorganization plan for eleven months.”<sup>38</sup> Paradise therefore argued that “Mr. Hill and the other true officers of Paradise” would never have executed the Assumption Agreement or “a bill of sale effectuating the assignment of the licenses to Inforum . . . unless and until Inforum met its obligations under the [Confirmed] Plan. . . .”<sup>39</sup> Rather, according to the PTD, the Assumption Agreement was fraudulently signed on behalf of Paradise, as the assignor, by Mr. Roberts.<sup>40</sup> In addition, the PTD accused Inforum of failing to file timely the Consummation Notice and to serve Paradise with a copy.<sup>41</sup> Paradise also asserted that consummation of the assignment could not have occurred prior to the payment of the outstanding arrearage owed on its installment note.<sup>42</sup> The PTD

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<sup>33</sup> *Id.*

<sup>34</sup> See Application; see also TDI Acquisition Corp., Amendment to Assignment Application (filed Sept. 25, 2001).

<sup>35</sup> See *Public Notice*, Report No. 460 (Aug. 3, 2001).

<sup>36</sup> See PTD. Responsive pleadings were thereafter filed by Inforum, TDI, and Paradise. See Inforum Communications, Inc. and TDI Acquisition Corp., Motion for Extension of Time (Sept. 13, 2001); Inforum Communications, Inc., Opposition to Petition to Deny (filed Sept. 27, 2001) (“Inforum Opposition”); TDI Acquisition Corp., Opposition to Petition to Deny (filed Sept. 27, 2001) (“TDI Opposition”); Paradise Cable, Inc., Consent Motion for Extension of Time (filed Oct. 3, 2001); Inforum Communications, Inc., Clarification to Paradise Consent Motion for Extension of Time (filed Oct. 10, 2001); Paradise Cable, Inc., Consolidated Reply to Oppositions (filed Oct. 16, 2001) (“Reply”); Inforum Communications, Inc., Response (filed Dec. 4, 2001); TDI Acquisition Corp., Comments on Inforum Communications, Inc. Response (filed Dec. 6, 2001); Paradise Cable, Inc., Objection to Response (filed Dec. 10, 2001); Paradise Cable, Inc., Objection to Comments (filed Dec. 12, 2001); Inforum Communications, Inc., Supplement to Response (filed Jan. 3, 2002); Paradise Cable, Inc., Rejoinder to Supplement (filed Jan. 11, 2002); Inforum Communications, Inc., Reply to Rejoinder (filed Jan. 16, 2002); Paradise Cable, Inc., Surreply to Reply to Rejoinder (filed Jan. 23, 2002); Inforum Communications, Inc., Reply to Surreply (filed Jan. 25, 2002); Inforum Communications, Inc., Minor Amendment (filed Feb. 6, 2002); Inforum Communications, Inc., Supplement (filed Oct. 16, 2002); Paradise Cable, Inc., Surrejoinder to Supplement (filed Oct. 25, 2002); Inforum Communications, Inc., Response to Surrejoinder (filed Oct. 31, 2002); Inforum Communications, Inc., Supplement to Response to Surrejoinder (filed Nov. 7, 2002).

<sup>37</sup> See PTD at 1.

<sup>38</sup> PTD at 2.

<sup>39</sup> PTD at 9.

<sup>40</sup> PTD at 4. Although the Assumption Agreement states that Mr. Roberts signed the document, under penalty of perjury, as an authorized representative of the assignor in his capacity as Director, Paradise argued that Mr. Roberts was neither an officer nor a director of Paradise and that it “was totally unaware that this document had been signed by someone on its behalf and without any authorization.” PTD at 4.

<sup>41</sup> See *id.*

<sup>42</sup> PTD at 5.

therefore requested that the Commission, based on the above, declare Paradise to be the actual licensee of the subject licenses.

9. On August 1, 2001, the licenses for Stations KNSC300 and KNSC798, as well as the authorization for the Sarasota, Florida BTA (MDB408) automatically cancelled pursuant to Section 1.2110(g)(4) of the Commission's Rules for non-payment of debt.<sup>43</sup> On October 30, 2001, Inforum filed a petition for reconsideration and a request that the Commission waive its rules to accept its late BTA installment payment.<sup>44</sup> The Division did not address or resolve the issues raised by Inforum in that filing in the *MO&O* that is currently before us on review.<sup>45</sup> On January 8, 2004, the Auctions and Spectrum Access Division of the Wireless Telecommunications Bureau released an *Order* denying the Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment.<sup>46</sup> That *Order* is currently under reconsideration and will not be addressed herein.<sup>47</sup>

10. The Division dismissed the PTD on September 9, 2003.<sup>48</sup> The Division found it untimely to the extent that it raised issues with respect to the Commission's consent to the prior assignment of the subject licenses from Paradise to Inforum.<sup>49</sup> The Division found that, even according to Paradise's own admission, it had actual notice, at the very latest, on December 8, 2000 of the facts that formed the basis for its instant allegations that the assignment had not been properly consummated.<sup>50</sup> While the Division reaffirmed that there are issues of regulatory and communications law that are unique to the Commission, it firmly stated "that questions as to consummation of assignment, timeliness, fraud, and finality, for example, all rest on common facts which were raised before and decided by the Bankruptcy Court."<sup>51</sup>

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<sup>43</sup> See 47 C.F.R. § 1.2110(g)(4).

<sup>44</sup> See Inforum Communications, Inc., Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment (dated Oct. 30, 2001).

<sup>45</sup> See *MO&O*, 18 FCC Rcd at 18514 n.54.

<sup>46</sup> See Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, 19 FCC Rcd 83 (2004).

<sup>47</sup> See Inforum Communications, Inc., Petition for Reconsideration (filed Feb. 9, 2004).

<sup>48</sup> *MO&O*.

<sup>49</sup> See *MO&O*, 18 FCC Rcd at 18514 ¶ 12. The Division also declined to consider "new" issues that were raised by the parties for the first time in a prolonged series of briefs that were found to be untimely filed outside the pleading cycle permitted by the Commission's Rules. See *MO&O*, 18 FCC Rcd at 18512 n.36 (citing 47 C.F.R. § 1.45). The Division did, however, "take official notice of pertinent court opinions attached to certain pleadings." *Id.*

<sup>50</sup> See *MO&O*, 18 FCC Rcd at 18514 ¶ 12 (citing Letter from John C. Hill, President, Paradise Cable, Inc., to Stephen Svab, Attorney, FCC (dated Aug. 20, 2001) (*Hill Letter*)). Mr. Hill therein noted that "[y]ou may recall how shocked I was in our phone conversation on December 8, 2000 when you told me the Transfer was complete and how I objected that no one had asked me to sign the Assumption Agreement." The *Hill Letter* is referenced in and attached to the PTD.

<sup>51</sup> *MO&O*, 18 FCC Rcd at 18513 ¶ 10. In this respect, the Division found that "common facts form the basis for both the instant matters raised by Paradise before the Commission and for the various claims previously litigated by Mr. Hill and other parties-in-interest in federal court." *MO&O*, 18 FCC Rcd at 18513 ¶ 10. The Division noted that, rather than promptly and timely bringing such matters before the Commission, "Mr. Hill and other parties-in-interest have unsuccessfully raised similar issues, including those alleging fraud due to the fact that Mr. (continued....)

The Division therefore emphasized that three federal courts have confirmed, after careful consideration of the same facts belatedly presented before the Commission, that the actions taken by the parties in this matter resulted in the substantial consummation of the Confirmed Plan and have therefore rejected attempts to revoke or rescind the *Confirmation Order*.<sup>52</sup> In light of the fact that there were no new issues raised that were unique to the Commission that could not have been timely brought before the Commission with regard to the prior assignment of the subject licenses from Paradise to Inforum, the Division dismissed the PTD.<sup>53</sup> The decision to dismiss the PTD was premised on a desire to avoid a re-examination of the same underlying factual matters that were within the province of the federal courts to decide. Although the Division dismissed the PTD, it did not act on the assignment application. On October 6, 2003, Paradise filed the instant AFR.<sup>54</sup>

### III. DISCUSSION

11. Paradise asserts that it has standing to file a petition to deny against the instant application seeking to assign the licenses in question from Inforum to TDI.<sup>55</sup> According to Paradise, it remains the rightful licensee because the prior assignment of the licenses to Inforum was invalid because it was never, in fact, consummated.<sup>56</sup> Paradise argues that the Division erred in concluding that the PTD was, in effect, an untimely attempt to seek reconsideration of the prior assignment of the licenses from Paradise to Inforum.<sup>57</sup> According to the AFR, Paradise was under no obligation or deadline to challenge the efficacy of the consummation of the assignment of the licenses from Paradise to Inforum at any point

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Roberts signed the Assumption Agreement on behalf of Paradise, in seeking to undo the transaction in federal court.” *MO&O*, 18 FCC Rcd at 18513 ¶ 10.

<sup>52</sup> *MO&O*, 18 FCC Rcd at 18513 ¶ 10.

<sup>53</sup> *MO&O*, 18 FCC Rcd at 18512-18514 ¶¶ 9-12.

<sup>54</sup> See AFR. Paradise filed an Erratum on October 14, 2003 because it “had assumed that in dismissing the petition to deny the Commission was also granting the underlying assignment application.” Paradise Cable, Inc., Erratum (filed Oct. 14, 2003). According to the Erratum, “that portion of the [AFR] which is premised on the Commission’s prior grant of the application are withdrawn.” *Id.* at 1-2. On October 27, 2003, Inforum filed an Opposition to Application for Review. See Inforum Communications, Inc., Opposition to Application for Review (Oct. 27, 2003). On December 16, 2003 and July 23, 2004, Inforum filed two “supplemental” pleadings to notify the Commission of the relevant decisions of the District Court and the Eleventh Circuit, respectively. See Inforum Communications, Inc., Supplement to Pleadings: Paradise Application for Review (filed Dec. 16, 2003); Inforum Communications, Inc., Supplement to Opposition to Paradise Application for Review (Jul. 23, 2004).

<sup>55</sup> See, e.g., AFR at 6-8.

<sup>56</sup> See, e.g., AFR at 8-13.

<sup>57</sup> See, e.g., AFR at 6-7. According to Paradise, “[i]n no case did the Commission take the position espoused by [PSPWD] here that the allegedly real licensee lacked standing to recover its license or that there was some point in time at which a licensee must discover that its licensee was wrongfully misappropriated or forever hold its peace.” AFR at 7-8. According to Paradise, the Commission considered a “claim lodged by the true licensee almost a year after the disputed assignment had occurred” in S.A. Dawson, *Memorandum Opinion and Order*, 17 FCC Rcd 472 (WTB 2002) (*Dawson*). AFR at 8.

prior to its filing of the instant PTD on August 31, 2000.<sup>58</sup> Paradise asserts that the present context was the best and earliest moment in which to “quiet its title” to the licenses.<sup>59</sup>

12. We have thoroughly reviewed the record before us, and conclude that the Division correctly resolved the issues before it. The primary issue is whether Paradise’s argument that the prior assignment of the licenses to Inforum was never consummated (thus leaving Paradise as the licensee of the stations) is properly before us. It has been our policy to accommodate court decrees adjudicating disputes over contract and property rights, unless a public interest determination compels a different result.<sup>60</sup> The Commission does not confer licensee status upon an applicant absent consummation.<sup>61</sup> Whether consummation of a Commission-approved sale occurred is a contractual issue within the province of a local court, not the Commission.<sup>62</sup> The Commission can then take whatever steps are necessary, if any, to accommodate the court’s ruling on matters within its jurisdiction.<sup>63</sup> In this matter, three federal courts have confirmed, after careful consideration of the same facts presented before the Commission, that the actions taken by the parties in this matter resulted in the substantial consummation of the Confirmed Plan and have therefore rejected attempts to revoke or rescind the *Confirmation Order*.<sup>64</sup> In so doing, the courts relied upon the finality of the consummation of the assignment of the

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<sup>58</sup> See AFR at 6-7.

<sup>59</sup> See AFR at 7, 16.

<sup>60</sup> See Dale J. Parsons, Jr., *Memorandum Opinion and Order*, 10 FCC Rcd 2718, 2721 ¶ 18 (1995) (*Parsons*) (quoting *Arecibo Radio Corporation, Memorandum Opinion and Order*, 101 FCC 2d 545, 550, n.12 (1985) (*Arecibo*)).

<sup>61</sup> See *Tsooris Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 1675, 1679 ¶ 9 (1999) (*Tsooris*) (once a court of competent jurisdiction found that the assignee obtained possession of the station through “trickery” and “deceit” and held that the transaction, in fact, was not consummated, the appropriate Commission action was the ministerial act of changing the licensee of record to comport with the court’s determination); see also *Syracuse Channel 62, Inc., Memorandum Opinion and Order*, 60 RR 2d 1161, 1165 (1986) (assignee was not treated as a licensee for purposes of standing to file a petition to deny an application in the same market, even though assignment application was granted, because assignment was not yet consummated).

<sup>62</sup> See *Tsooris*, 12 FCC Rcd 1678-1679 at ¶ 8; Kirk Merkley, *Memorandum Opinion and Order*, 94 FCC 2d 829, 838 ¶ 18 (1983) (*Merkley*), *recon. denied*, 56 RR 2d 413 (1984), *aff’d per curiam*, 776 F.2d 365 (1985). Because the Commission does not possess the resources, expertise, or jurisdiction to adjudicate such questions fully, the Commission normally defers to judicial determinations regarding the interpretation and enforcement of contracts for the sale of stations. See *Merkley*, 94 FCC 2d at 838 ¶ 18.

<sup>63</sup> See *Tsooris*, 12 FCC Rcd at 1678-1679 at ¶ 8; *Parsons*, 10 FCC Rcd at 2719-2720 ¶¶ 8-13 (Commission corrects records to reflect a federal court ruling setting aside a sale previously approved by the Commission and putatively consummated by the parties which the court found had never been lawfully consummated); *Channel 33, Inc., Memorandum Opinion and Order*, 4 FCC Rcd 7674 (1988) (Commission waives multiple ownership rules and grants assignment to qualified licensee to accommodate court order issued pursuant to bankruptcy reorganization plan); *Arecibo*, 101 FCC 2d at 548- 49 ¶¶ 9-10 (Commission waives application signature rule in deference to local court’s ruling on contract dispute, facilitating court-approved sale to qualified licensee).

<sup>64</sup> See *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (No. 98-04207-8B1))*, *Order on Defendant’s Motion for Summary Judgment*, Adv. No. 99-591 (Bankr. M.D.FL. Dec. 23, 1999); *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (BK No. 98-04207-8B1))*, *Order on Appeal*, Docket No. 39 (Adv. No. 99-591) (M.D.FL. Feb. 9, 2001); *Hansen v. SkyLynx Communications, Inc. (In re Cable Corporation of America (BK No. 98-04207-8B1))*, *Judgment*, Docket No. 40 (Adv. No. 99-591) (11<sup>th</sup> Cir. Ct. App. July 6, 2001).

subject licenses from Paradise to Inforum.<sup>65</sup> Consistent with our policies, we defer to the findings and conclusions reached by the courts.

13. Notably, Paradise admits that it had actual notice, at the very latest, on December 8, 2000 of the facts that formed the basis for its instant allegations that the assignment had not been properly consummated.<sup>66</sup> In that regard, we agree with the following statement from the Division:

We do not need to address whether Paradise would have been entitled to relief from the Commission if it had requested such relief. Rather, Paradise sought relief from the federal courts instead of the Commission. Having chosen to pursue its claim in federal court, it may not seek relief from the Commission challenging the result reached by the courts.<sup>67</sup>

We find Paradise's untimely attempt to use a subsequent assignment application to litigate issues that were not timely brought before the Commission when Paradise first learned of what it deems "irregularities with the consummation" of the prior assignment of the subject licenses from Paradise to Inforum to be fundamentally and fatally flawed. We therefore agree with the Division that the PTD is an untimely attempt to seek reconsideration of the finality of the assignment of the subject licenses from Paradise to Inforum.<sup>68</sup> Even when the Bankruptcy Court began taking evidence and testimony to determine whether (and when) the assignment of the subject licenses from Paradise to Inforum became final, Paradise failed to bring the matter before the Commission.<sup>69</sup>

14. According to Paradise, in the *Dawson*<sup>70</sup> case, the Commission considered a "claim lodged by the true licensee almost a year after the disputed assignment had occurred."<sup>71</sup> Paradise's reliance on the *Dawson* case is misplaced. Unlike the present matter before the Commission, *Dawson* involved an *unresolved* allegation of fraud that the Commission found could not be resolved based solely on the conflicting pleadings submitted by the parties.<sup>72</sup> Because the Bureau found that the conflicting

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<sup>65</sup> See, e.g., *Order* at 7-11. Indeed, the Confirmed Plan itself was contingent upon the parties obtaining the consent of the Commission to the assignment of the subject licenses from Paradise to Inforum. See Confirmed Plan, Section 6.1.

<sup>66</sup> AFR at 7.

<sup>67</sup> *MO&O*, 18 FCC Rcd at 18514 ¶ 12.

<sup>68</sup> See *MO&O*, 18 FCC Rcd at 18512-18514 ¶¶ 9-12.

<sup>69</sup> See generally *Order* at 7-11; see *Order* at 8-9 (discussing testimony taken on or about May 2, 2001 with regard to the finality of the assignment of the subject licenses from Paradise to Inforum).

<sup>70</sup> *Dawson*, n.59, *supra*.

<sup>71</sup> AFR at 7-8.

<sup>72</sup> *Dawson*, 17 FCC Rcd at 474 ¶ 7. The allegation was that, one year after licensee S.A. Dawson d/b/a Dawson Associates (Dawson) assigned the license for Station WNVE296 to American National Communications Companies, Inc. (ANCC), a Mr. Robert Eaton (Eaton) "caused the license for WNVE296 to be reassigned to Dawson ... by fraudulently representing himself as an officer of ANCC" and signing the assignment application on behalf of ANCC. See *id.*

pleadings filed by ANCC and Dawson raised a substantial and material issue of fact<sup>73</sup> and failed to resolve the issue conclusively, the Bureau concluded that, *if it were required to decide the matter*, further development of the record would be necessary, with the possibility of ultimately designating the matter for hearing.<sup>74</sup> The Bureau noted “that the dispute between ANCC and Dawson and the issue of Eaton’s authority appears to be a contractual matter of the sort that is ordinarily addressed by the courts rather than the Commission.”<sup>75</sup> In contrast to *Dawson*, Paradise asks the Commission to ignore the relevant decisions of three federal courts that considered and rejected the allegations of fraud and other irregularities with regard to the consummation of the assignment of the subject licenses from Paradise to Inforum,<sup>76</sup> even though Paradise chose to seek relief in the federal courts and failed to timely raise such matters before the Commission.<sup>77</sup>

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<sup>73</sup> The Commission has substantial deference in determining whether factual questions are presented that rise to the triggering level of a substantial and material issue. *See, e.g., Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465 (D.C. Cir. 1987); *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95 (D.C. Cir. 1985).

<sup>74</sup> *Id.* Where there is no legal or factual question that an unauthorized assignment has taken place, the Commission will act to invalidate the transaction. *See Clarklift of San Jose, Inc. and Moore Material Handling Group, Second Order on Further Reconsideration*, 16 FCC Rcd 14844, 14846 ¶¶ 6-7 (WTB 2001) (*Clarklift*); *see also* *Champion Communications Services, Inc., Order*, 15 FCC Rcd 12832, ¶ 2 (WTB PSPWD 2000).

<sup>75</sup> *Dawson*, 17 FCC Rcd at 474 ¶ 7. The Commission explained that the “Commission generally does not adjudicate private contractual disputes, but instead attempts to reach a fair accommodation between its exclusive authority over licensing matters and the authority of state and local courts through procedures that defer contractual matters to courts to decide under state and local law.” *Id.* at 474 n.15 (*citing* *Airtouch Paging, Inc., Order*, 14 FCC Rcd 9658 (WTB CWB P&RB 1999); *Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987)).

<sup>76</sup> Paradise’s reliance on *Tsooris* is also misplaced. *Tsooris* did not decide whether a “closing” of an assignment had, in fact, occurred. *See Tsooris*, 12 FCC Rcd at 1676 ¶ 2. Although the matter was initially brought before the Commission, the parties were notified that when the conflict was resolved by a local court of competent jurisdiction, “[t]he parties may then refer that court’s determination as to their rights to us for any action appropriate under the circumstances.” *Id.* (internal citations omitted). The Commission made it expressly clear that, once a court of competent jurisdiction found that the assignee obtained possession of the station through “trickery” and “deceit” and held that the transaction, in fact, was not consummated, the appropriate Commission action was the ministerial act of changing the licensee of record to comport with the court’s determination. *See id.* at 1679 ¶ 9; *see also Parsons*; 10 FCC Rcd at 2719-20, ¶¶ 6, 9 (approving staff action correcting Commission records to comply with court determination that consummation of transfer had not occurred).

<sup>77</sup> In addition, we reject the contention that the Division erred in rejecting the supplemental pleadings submitted by Paradise. Supplemental pleadings will be allowed “only in the most compelling and unusual circumstances when it is felt that basic fairness to a party requires such action. . .” *D.H. Overmyer Communications Co., Memorandum Opinion and Order*, 4 FCC 2d 496, 505 (Rev. Bd. 1966). The Division correctly found that, nearly two months after the close of the pleading cycle set-forth in the Commission’s Rules, the parties filed a voluminous series of untimely pleadings without the prior leave of the Division, often introducing new arguments that were not previously raised by the parties in their prior filings. *See MO&O*, 18 FCC Rcd at 18512 n.36. On the other hand, we find that the Division appropriately took into consideration the relevant decisions by the Bankruptcy Court, the District Court, and the Eleventh Circuit that occurred after the close of the pleading cycle. We note that those decisions resolved various proceedings that Paradise itself first brought to the attention of the Commission.

**IV. CONCLUSION AND ORDERING CLAUSES**

15. We conclude that the Division correctly dismissed Paradise's PTD. In light of the court's determinations that that Confirmed Plan had been substantially consummated, we reject Paradise's untimely arguments that the assignment from Paradise to Inforum had not been consummated. We therefore deny the AFR.

16. **ACCORDINGLY, IT IS ORDERED** that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Paradise Cable, Inc. on October 6, 2003 **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary